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**Untung v Public Prosecutor**

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL  
NO B-05(M)-252-08 OF 2020  
KAMALUDIN MD SAID, NORDIN HASSAN AND  
MOHD NAZLAN JJCA  
20 JUNE 2023

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*Criminal Law — Murder — Defence of grave and sudden provocation — Burden of proving grave and sudden provocation — Whether loss of self-control proven — Whether accused was provoked by grave and sudden provocation that resulted in loss of self-control that made him kill the deceased — Whether reasonable man would have reacted the same way as accused — Whether defence of grave and sudden provocation established — Evidence Act 1950 s 105 — Penal Code exception 1 to s 300, ss 300(c) & 302*

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*Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused convicted for offence of murder and sentenced to death — Whether accused had intention to commit murder — Whether accused only intended to commit suicide — Whether evidence of acute stress disorder by accused's expert witness should be accepted — Whether there was a grave and sudden provocation — Penal Code exception 1 to s 300, ss 300(c) & 302*

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This was a heart-rending story of a relationship between a man and a woman which ended with a sorrowful death and a criminal prosecution. The appellant was charged under s 302 of the Penal Code ('the PC') for murdering the deceased at the car park of a mosque located in Petaling Jaya. The learned trial judge found that all the elements of the offence were proven, and a prima facie case was established. Firstly, the death of the deceased was established based on the evidence of the deceased's employer ('PW10'), the pathologist ('PW20') as well as the investigating officer ('PW21'). Secondly, PW20 had confirmed that the death of the deceased was due to the stab wounds from sharp piercing object such as knife to the deceased's chest and abdomen, causing massive loss of blood. Thirdly, it was established that the injuries of the deceased were caused by the act of the appellant based on the following circumstantial evidence: (a) the appellant was the last to be seen with the deceased by PW15, PW10, PW18 and PW21; and (b) the report ('exh P22') of the chemist ('PW11') which confirmed that the DNA of the appellant was found on the knife and the knife sheath. Lastly, based on the evidence of PW20 who testified that the stab wounds, taken either individually or collectively, were sufficient in the ordinary course of nature to cause death, the learned trial judge found that

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s 300(c) of the PC was satisfied. The appellant raised the defence of grave and sudden provocation under exception 1 of s 300 of the PC. The appellant argued that at the material time, he planned to commit suicide but even after he had consumed the poison and stabbed himself four times at the abdomen, the deceased continued to taunt him which eventually led to his action of stabbing the deceased. In addition, the appellant relied on the evidence of a psychiatrist ('DW2') who testified that the appellant suffered acute stress disorder prior to the date of the incident. At the end of the trial, the learned trial judge found that based on the evidence of the events and conduct of the appellant leading to him meeting the deceased at the car park, as well as his own testimony of what had occurred at the material time, the appellant could not be said to have lost his self-control by the alleged taunts made by the deceased and that the appellant was not under severe depression, as such, the defence was not proven and the prosecution had established its case beyond reasonable doubt. Consequently, the appellant was convicted on the charge of murder and sentenced to death, hence the present appeal. The issues arose were: (i) whether the appellant only intended to commit suicide — in relation to this issue, the appellant contended that if the appellant truly had the intention to murder the deceased, he would not do so at the public area such as the carpark of the mosque and that the appellant would have stabbed the deceased first to ensure that she was dead before he committed suicide; (ii) whether the evidence of acute stress disorder by DW2 should be accepted; and (iii) whether there was a grave and sudden provocation.

**Held**, dismissing the appeal and affirming the conviction and sentence of the High Court:

- (1) The court agreed with the findings of the High Court, which were not disputed by the appellant, that the prosecution had proved that the appellant committed the act which caused the death of the deceased. Having regard to the evidence of PW20 on the nature of injuries found on the deceased, the learned trial judge was correct to hold that the said act was done with the intention of causing bodily injury which injuries were sufficient in the ordinary course of nature to cause death. Expert medical evidence was available in this case for the High Court to affirmatively arrive at this finding on s 300(c) of the PC (see para 32).
- (2) With respect to intention to commit murder, even though the appellant was not inaccurate to contend that the car park was a public area, but this did not mean that members of the public were accessing the area at that time of the day given that the incident happened about two hours after the congregation at the mosque would have performed the final compulsory prayer of the day (*Isya*). There was also no good reason why he could not have attempted to kill himself first before immediately stabbing to murder the deceased. Further, it was the finding of the learned trial judge that the appellant had first attacked and stabbed the

- A deceased before injuring himself and finally making one final stab into the chest of the deceased (see paras 55–56).
- (3) In order to bring a case within exception 1 of s 300 of the PC, it was imperative that the following facts be established: (a) the accused must have committed the act whilst being deprived of the power of self-control; (b) he must have been so deprived because of the provocation; (c) the provocation must have been grave and sudden; (d) the provocation must not have been sought by the accused, or voluntarily provoked by him or her as an excuse for doing the act; and (e) the provocation must not have been given by anything done in obedience to the law or by a public servant in the lawful exercise of his powers as such, or by anything done in the lawful exercise of the right of private defence (see para 38).
- (4) Whether there was a grave and sudden provocation which did cause an accused to lose self-control was a question of fact, and that it must also be shown, as an objective test, whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed (but any particular idiosyncrasies of the accused to be disregarded) would be so provoked as to lose his self-control. In the process, the nature of the retaliation by the accused, having regard to the nature of the provocation may also be considered by the court. For the defence of provocation to succeed, there must be evidence to support it, and the burden of proving the circumstances in s 105 of the Evidence Act 1950 was on the appellant, as the accused, on the balance of probabilities (see paras 40–41 & 61).
- (5) Based on DW2's own answer during his cross examination, the learned trial judge was not wrong in his conclusion that DW2 was not an expert or true psychiatrist, but his field was in psychological medicine. Further, the learned trial judge had found that DW2 did not provide any report to support his opinion on the appellant's mental condition. The judicial acceptance of DW2's opinion would run counter to the principle that where the opinion of experts was based on reports of facts, the facts must be proved independently unless they were within the expert's own knowledge. The learned trial judge was at any rate in a better position than this court to assess the value of DW2's evidence and other witnesses who testified at the trial. The court should be slow to interfere with the learned trial judge's findings (see paras 63, 65 & 73–76).
- (6) In addition, the evidence showed that the appellant was able to plan the purchase of pesticide poison, brought along a knife and went to a quiet place to meet the deceased. It was clearly a deliberate and 'well thought out' plan. These facts showed that the appellant was fully conscious and deliberate in his conduct and actions. Nothing in fact suggested that he was in a state of severe stress or depression that would affect his

self-control. In light of the above reasons, the learned trial judge was not in error in his decision not to accept the evidence of DW2 on the mental state of the appellant at the material time. Furthermore, considering that there was no loss of self-control on the part of the appellant, the appellant had failed to prove the defence of grave and sudden provocation (see paras 79–81 & 83–84).

- (7) The peculiarities and idiosyncrasies of an accused such as the appellant should be taken into account in the first, subjective limb of the analysis to ascertain whether he was indeed provoked by the grave and sudden provocation that resulted in the loss of self-control that made him kill the deceased. These might include his mental state having been adversely affected by a major depression or an acute stress disorder at the material time. But the court had dismissed this submission for lack of evidence and agreed with the findings of the High Court. Even if this illness was proven, this was entirely irrelevant in the second, objective test limb as to whether a reasonable man (the ordinary man from his community) would have reacted the same way as the appellant had done, and in any event, there was similarly a patent paucity of evidence to show such a reaction by a reasonable man. In the present case, the court agreed with the learned trial judge that even if there was a provocation by the deceased, the appellant's reaction in his retaliation was disproportionate to the provocation and that a reasonable man in the situation and circumstances of the appellant would not have acted as the appellant did, ie, attacking and killing a defenceless woman with multiple stabbings (see paras 99–101).
- (8) The court found no valid basis for appellate intervention in the absence of any appealable error in the conclusion by the learned trial judge on the failure of the appellant to establish the defence of grave and sudden provocation. The court therefore found that the appellant failed to raise any reasonable doubt as to his guilt. On the totality of the evidence, the conviction was safe (see paras 107–109).

#### [Bahasa Malaysia summary]

Ini adalah kisah menyayat hati tentang hubungan antara seorang lelaki dan seorang wanita yang berakhir dengan kematian yang menyedihkan dan pendakwaan jenayah. Perayu didakwa di bawah s 302 Kanun Keseksaan ('KK') kerana membunuh si mati di tempat letak kereta sebuah masjid yang terletak di Petaling Jaya. Hakim perbicaraan yang arif mendapati bahawa semua elemen kesalahan telah dibuktikan, dan kes prima facie telah ditubuhkan. Pertama, kematian si mati dibuktikan berdasarkan keterangan majikan si mati ('PW10'), pakar patologi ('PW20') serta pegawai penyiasat ('PW21'). Kedua, PW20 mengesahkan kematian si mati adalah akibat kesan tikaman objek tajam seperti pisau di dada dan perut si mati, menyebabkan kehilangan banyak darah. Ketiga, telah dibuktikan bahawa kecederaan si mati adalah disebabkan

- A oleh perbuatan perayu berdasarkan keterangan mengikut keadaan berikut: (a) perayu adalah yang terakhir dilihat bersama si mati oleh PW15, PW10, PW18 dan PW21; dan (b) laporan ('eksh P22') ahli kimia ('PW11') yang mengesahkan bahawa DNA perayu ditemui pada pisau dan sarung pisau tersebut. Akhir sekali, berdasarkan keterangan PW20 yang menyatakan bahawa luka tikaman, jika diambil kira sama ada secara individu atau kolektif, adalah cukup pada lazimnya bagi menyebabkan kematian, hakim perbicaraan yang arif mendapati bahawa s 300(c) KK telah dipenuhi. Perayu membangkitkan pembelaan bangkitan-marah yang besar dan mengejut di bawah kecualian 1 daripada s 300 KK. Perayu berhujah bahawa pada masa material, dia bercadang untuk membunuh diri tetapi walaupun selepas dia menghabiskan racun dan menikam dirinya empat kali di perut, si mati terus menyindirnya yang akhirnya membawa kepada tindakannya menikam si mati. Selain itu, perayu bergantung kepada keterangan pakar psikiatri ('DW2') yang memberi keterangan bahawa perayu mengalami gangguan tekanan akut sebelum tarikh kejadian. Pada akhir perbicaraan, hakim bicara yang arif mendapati bahawa berdasarkan keterangan peristiwa dan kelakuan perayu yang membawa kepada dia bertemu si mati di tempat letak kereta, serta keterangannya sendiri tentang apa yang telah berlaku pada masa yang material, perayu tidak boleh dikatakan hilang akal disebabkan oleh sindiran yang dibuat oleh si mati dan perayu tidak mengalami kemurungan yang teruk, oleh itu, pembelaan tersebut gagal dibuktikan dan pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Akibatnya, perayu telah disabitkan atas pertuduhan membunuh dan dijatuhkan hukuman mati, justeru rayuan semasa. Isu-isu yang timbul ialah: (i) sama ada perayu hanya berniat untuk membunuh diri — berhubung isu ini, perayu berhujah bahawa jika perayu benar-benar berniat untuk membunuh si mati, dia tidak akan berbuat demikian di kawasan awam seperti tempat letak kereta masjid dan perayu akan menikam si mati terlebih dahulu untuk memastikan si mati telah mati sebelum dia membunuh diri; (ii) sama ada keterangan gangguan tekanan akut oleh DW2 patut diterima; dan (iii) sama ada terdapat bangkitan-marah yang besar dan mengejut.

**Diputuskan,** menolak rayuan dan mengesahkan sabitan dan hukuman Mahkamah Tinggi:

- H (1) Mahkamah bersetuju dengan penemuan Mahkamah Tinggi, yang tidak dipertikaikan oleh perayu, bahawa pihak pendakwaan telah membuktikan bahawa perayu melakukan perbuatan yang menyebabkan kematian si mati. Mengambil kira keterangan PW20 mengenai jenis kecederaan yang ditemui ke atas si mati, hakim bicara yang arif adalah betul dalam berpendirian bahawa perbuatan tersebut dilakukan dengan niat untuk menyebabkan bencana tubuh yang mana bencana tubuh tersebut adalah cukup, pada lazimnya, bagi menyebabkan kematian. Keterangan perubatan pakar tersedia dalam kes ini untuk Mahkamah
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- Tinggi secara afirmatif mencapai penemuan ini mengenai s 300(c) KK (lihat perenggan 32). A
- (2) Berkenaan dengan niat untuk membunuh, walaupun perayu bukanlah tidak tepat untuk menyatakan bahawa tempat letak kereta tersebut adalah kawasan awam, tetapi ini tidak bermakna orang awam sedang mengakses kawasan tersebut pada waktu itu memandangkan bahawa kejadian tersebut berlaku kira-kira dua jam selepas jemaah di masjid menunaikan solat fardu terakhir pada hari itu (Isya'). Tidak ada sebab kukuh mengapa dia tidak boleh cuba membunuh diri terlebih dahulu sebelum segera menikam untuk membunuh si mati. Selanjutnya, hakim bicara yang arif telah pun membuat penemuan bahawa perayu telah menyerang dan menikam si mati terlebih dahulu sebelum mencederakan dirinya dan akhirnya membuat satu tikaman terakhir ke dada si mati (lihat perenggan 55–56). B  
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- (3) Untuk membawa kes dalam kecualian 1 daripada s 300 KK, adalah mustahak bahawa fakta-fakta berikut dibuktikan: (a) tertuduh mestilah melakukan perbuatan tersebut tatkala hilang akal; (b) dia mestilah telah hilang akal disebabkan oleh bangkitan-marah; (c) bangkitan-marah tersebut mestilah besar dan mengejut; (d) bangkitan-marah tersebut mestilah tidak dicari-cari oleh tertuduh, atau dibangkitkan dengan sengaja olehnya sebagai suatu helah bagi melakukan perbuatan tersebut; dan (e) bangkitan-marah tersebut mestilah tidak didatangkan oleh sesuatu perkara yang dilakukan pada menurut undang-undang atau oleh seseorang penjawat awam pada menjalankan kuasanya dengan sah di sisi undang-undang, atau oleh apa-apa jua yang dilakukan pada menjalankan hak pertahanan persendirian yang sah di sisi undang-undang (lihat perenggan 38). D  
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- (4) Sama ada terdapat bangkitan-marah yang besar dan mengejut yang menyebabkan seseorang tertuduh hilang akal adalah persoalan fakta, dan ia juga mesti ditunjukkan, sebagai ujian objektif, sama ada seorang lelaki yang munasabah, yang tergolong dalam kelas masyarakat yang sama dengan tertuduh, diletakkan dalam situasi di mana tertuduh diletakkan (tetapi apa-apa idiosinkrasi tertentu tertuduh tidak diendahkan) akan mengalami bangkitan-marah sehingga hilang akal. Dalam proses tersebut, sifat tindakan balas oleh tertuduh, dengan mengambil kira sifat bangkitan-marah juga boleh dipertimbangkan oleh mahkamah. Untuk memastikan pembelaan bangkitan-marah berjaya, perlu ada keterangan untuk menyokongnya, dan beban membuktikan keadaan dalam s 105 Akta Keterangan 1950 adalah pada perayu, sebagai tertuduh, atas imbalan kebarangkalian (lihat perenggan 40–41 & 61). G  
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- (5) Berdasarkan jawapan DW2 sendiri semasa pemeriksaan balasnya, hakim bicara yang arif tidak salah dalam kesimpulannya bahawa DW2 bukanlah pakar atau pakar psikiatri yang sebenarnya, tetapi bidangnya

- A adalah dalam perubahan psikologi. Selanjutnya, hakim bicara yang arif telah mendapati bahawa DW2 tidak memberikan apa-apa laporan untuk menyokong pendapatnya tentang keadaan mental perayu. Penerimaan kehakiman terhadap pendapat DW2 akan bertentangan dengan prinsip bahawa apabila pendapat pakar adalah berdasarkan laporan fakta, fakta
- B perlu dibuktikan secara berasingan melainkan ia berada dalam pengetahuan pakar itu sendiri. Hakim perbicaraan yang arif dalam apa keadaan sekalipun berada dalam kedudukan yang lebih baik daripada mahkamah ini untuk menilai keterangan DW2 dan saksi-saksi lain yang memberi keterangan pada perbicaraan. Mahkamah harus tidak
- C terburu-buru untuk mengganggu keputusan hakim bicara yang arif (lihat perenggan 63, 65 & 73–76).
- (6) Selain itu, keterangan menunjukkan perayu boleh merancang pembelian racun perosak, membawa sebilah pisau dan pergi ke tempat yang sunyi untuk berjumpa dengan si mati. Ia jelas merupakan rancangan yang disengajakan dan ‘difikirkan dengan baik’. Fakta-fakta ini menunjukkan bahawa perayu sedar sepenuhnya dan sengaja dalam kelakuan dan tindakannya. Tiada apa-apa dalam fakta yang menunjukkan bahawa dia berada dalam keadaan tekanan atau kemurungan yang teruk yang akan menyebabkannya hilang akal. Berdasarkan alasan-alasan di atas, hakim bicara yang arif tidak terkhilaf dalam keputusannya untuk tidak menerima keterangan DW2 mengenai keadaan mental perayu pada masa yang material. Tambahan pula, memandangkan perayu tidak hilang akal, perayu telah gagal membuktikan pembelaan bangkitan-marah yang berat dan mengejut (lihat perenggan 79–81 & 83–84).
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- (7) Kelakuan pelik dan idiosinkrasi seseorang tertuduh seperti perayu harus diambil kira dalam analisis subjektif yang pertama untuk memastikan sama ada dia memang diprovokasi oleh bangkitan-marah yang besar dan mengejut yang mengakibatkan dia hilang akal yang membuatnya membunuh si mati. Ini mungkin termasuk keadaan mentalnya yang telah terjejas teruk oleh kemurungan besar atau gangguan tekanan akut pada masa tersebut. Tetapi mahkamah telah menolak hujahan ini kerana kekurangan keterangan dan mahkamah telah bersetuju dengan penemuan Mahkamah Tinggi. Jikapun penyakit ini dibuktikan, ini sama sekali tidak relevan dalam ujian kedua yang objektif iaitu sama ada seorang lelaki yang munasabah (lelaki biasa dari komunitinya) akan bertindak balas dengan cara yang sama seperti yang dilakukan oleh perayu, dan dalam apa jua keadaan, terdapat juga kekurangan keterangan untuk menunjukkan reaksi sedemikian oleh seorang lelaki yang munasabah. Dalam kes ini, mahkamah bersetuju dengan hakim perbicaraan yang arif bahawa walaupun terdapat bangkitan-marah oleh si mati, reaksi perayu dalam tindakan balasnya adalah tidak seimbang dengan bangkitan-marah tersebut dan bahawa seorang lelaki yang munasabah dalam situasi dan keadaan perayu tidak akan bertindak
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seperti yang dilakukan oleh perayu, iaitu, menyerang dan membunuh seorang wanita yang tidak berdaya dengan tikaman yang banyak (lihat perenggan 99–101).

- (8) Mahkamah mendapati tiada asas yang sah untuk campur tangan rayuan memandangkan tiada apa-apa kekhilafan yang boleh dirayu dalam kesimpulan oleh hakim bicara yang arif mengenai kegagalan perayu untuk membuktikan pembelaan bangkitan-marah yang besar dan mengejut. Oleh itu mahkamah mendapati perayu gagal menimbulkan apa-apa keraguan munasabah terhadap kebersalahannya. Berdasarkan keseluruhan keterangan, sabitan adalah selamat (lihat perenggan 107–109).]

#### Cases referred to

*Che Omar bin Mohd Akhir v PP* [2007] 4 MLJ 309; [2007] 3 CLJ 281, FC (refd)

*Cheong Kam Kuen v PP* [2013] 1 MLJ 15, FC (refd)

*Lee Chin Hock v PP* [1972] 2 MLJ 30, FC (refd)

*Ikau Anak Mail v PP* [1973] 2 MLJ 153, FC (refd)

*PP v Pham Ti Tuyet Mai (Vietnam)* [2019] 5 MLJ 404; [2019] 6 CLJ 325, CA (refd)

*Pacific Tin Consolidated v Hoon Wee Thim* [1967] 2 MLJ 35, FC (refd)

*Pubalan all Peremal v PP* [2020] 5 MLJ 442, FC (refd)

*Sainal Abidin bin Mading v PP* [1999] 4 MLJ 497, CA (refd)

*Tham Kai Yau & Ors v PP* [1977] 1 MLJ 174, FC (refd)

*Tompo bin Yara v PP* [2017] 2 MLJ 366, CA (refd)

*Wong Poh Ling v PP* [2017] MLJU 30; [2017] 1 LNS 16, CA (refd)

*Zulkiplé bin Mohamad v PP* [2022] 1 MLJ 479; [2022] 1 CLJ 673, FC (refd)

#### Legislation referred to

Evidence Act 1950 s 105

Penal Code ss 300, 300(c), 302, 304(a)

**Appeal from:** *Pendakwa Raya lwn Untung* [2021] MLJU 1314 (High Court, Shah Alam)

*Lim Wei Qi (with S Selvi) (Gooi & Azura) for the appellant.*

*Ng Siew Wee (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**A Mohd Nazlan JCA:**

## INTRODUCTION

**B** [1] The appellant was charged in the High Court at Shah Alam for murder, an offence punishable under s 302 of the Penal Code. The charge was framed as follows:

**C** Bahawa kamu pada 22 Disember 2018 jam lebih kurang 10.15 malam hingga 10.46 malam bertempat di perkarangan Masjid Al-Husna, Jalan PJS 10/20, Sg Way, di dalam daerah Petaling Jaya, di dalam negeri Selangor Darul Ehsan, telah melakukan bunuh dengan menyebabkan kematian ke atas Asmaul Chasanah (No Paspot: B 8031185). Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

**D** [2] The High Court had found the appellant guilty and convicted him on the said charge. He was sentenced to death.

**E** [3] This is the appeal by the appellant against the said order of the High Court.

[4] At the conclusion of the hearing of the appeal, we unanimously dismissed the same, for the reasons which now follow.

## THE ESSENCE OF PROSECUTION CASE

**F** [5] On 22 December 2018, at about 10pm, Raja Mohamad Emier bin Raja Zaabar (PW15), whilst walking from his mother's flat in Sungei Way Pyramid PJS 10 (located next to Masjid Al-Husna) towards his car which was parked in the compound of the mosque, saw a woman lying on the ground with a knife stuck in her chest. Next to the woman was a man who was in a seating position. **G** Within the ensuing two to three minutes, PW15 witnessed the man lie down next to the woman. PW15 was about 40 to 50 meters from the said two individuals. He immediately contacted the police.

**H** [6] This call was received by L/Kpl Jamaliah bt Osman (PW16), on duty at Pusat Kawalan Daerah IPD Petaling Jaya who then dispatched a patrol team to the location. This led to Koperal Rone Allen ak Kabang (PW1) together with L/Kpl Michel Liew rushing to the scene. On their arrival, PW1 saw that an ambulance was already there and at the parking area, a man was lying on the ground with blood around his stomach and foam in his mouth. Next to the man was a woman lying motionless with a knife stuck in the left chest area ('the deceased'). **I**

[7] Earlier, on his arrival at the location, Ahmad Azzrie Izreen bin Ahmad Azhar (PW18), who was with Hospital Kuala Lumpur ambulance saw that a team from Sunway Medical Centre was already attending to the appellant. PW18 then discovered stab wounds in the chest and abdomen of the woman as well as slash marks in both her hands. From his examination, there were no signs of life in the woman (the deceased). PW18 handed over the passport of the man who was next to the deceased, to PW1, which showed that the name of the man is Untung, an Indonesian national, who is the accused, and the appellant in this appeal.

[8] Separately, earlier, one Siaw Ching Long (PW10) received a call from a fellow worker of the deceased about the incident. PW10 confirmed that the deceased was his employee. PW10 also then contacted the police and the ambulance.

[9] The investigating officer, ASP Ramesh a/l Nagayah (PW21) got to the scene at 11.20pm. He was assisted by the forensic team from IPK Selangor led by Inspector Saiedayu binti Kamisan (PW12), who found a knife stuck in the left side of the chest of the deceased, and near the deceased, a bottle cover together with a spraying pipe, a white bottle without cover but with blood stains, and traces of vomit. In addition, discovery was also made of a baseball cap, a pair of shoes and a knife sheath, all three with traces of blood. Very early in the following day, at 1.50am on 23 December 2018, PW21 arrested the appellant at University Malaya Medical Centre (UMMC) where the latter had been brought in for treatment.

[10] At Hospital Kuala Lumpur, where the deceased was sent for post mortem, Dr Ahmad Hafizam bin Hasmi (PW20) who performed the autopsy determined that the cause of death was stab wounds to the chest and abdomen. The appellant was later charged with the murder of the deceased, an Indonesian woman known as Asmaul Chasanah.

#### FINDINGS AT THE END OF THE PROSECUTION CASE

[11] At the High Court, the learned trial judge had examined the ingredients that must be established to constitute the offence of murder under s 300 of the Penal Code, relying in this regard among others, on the Court of Appeal decision in the case of *Sainal Abidin bin Mading v Public Prosecutor* [1999] 4 MLJ 497 which in clear terms set out the following as the ingredients for the offence of murder:

- (a) that the deceased is dead;
- (b) that the death was a result of injuries sustained by the deceased; and

- A** (c) that the injuries of the deceased were caused by or the result of the act of the accused.

[12] Further, in inflicting the injuries upon the deceased, the accused must be proved to have either:

- B** (a) caused them with the intention of causing death; or  
(b) caused them with the intention of causing such bodily injuries as the appellant knew to be likely to cause the death; or
- C** (c) caused them with the intention of causing bodily injuries and such bodily injuries were sufficient in the ordinary course of nature to cause death; or  
(d) caused them knowing that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and did so without any excuse for incurring the risk of causing death, or such injury.
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- E** [13] The death of the deceased, who passed away on 22 December 2018 between 10.15pm and 10.46pm, was duly certified and not disputed. This was also confirmed by PW10, the deceased's employer, PW20, the pathologist who examined the deceased, and PW21, the investigating officer.

- F** [14] As for the cause of death, the learned trial judge found that as testified by the pathologist (PW20) this was due to stab wounds from sharp piercing object such as a knife to the deceased's chest and abdomen, causing massive loss of blood. According to the testimony of PW20, there were seven stab wounds, five of which were fatal. The knife was also found in the chest of the deceased at the crime scene, as witnessed by many.
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- H** [15] In respect of the third ingredient — that the fatal injuries were caused by the appellant, the High Court was clear in stating that there were no eyewitnesses to the crime. Nobody saw the appellant or anyone else stabbing the deceased. But the learned trial judge found that circumstantial evidence pointed to the appellant as the perpetrator.

- I** [16] In particular, the appellant was the last to be seen with the deceased, as testified by PW15 who was the first person to have seen the appellant and the deceased, and followed soon after by PW10 the deceased's employer, and several others who later came to the crime scene, including PW18 and PW21.

[17] In addition, Nor Ummiza bt Kamaruzaman, the chemist (PW11) in her report (exh P22) confirmed that the DNA of the appellant was found on the

knife that was stuck in the chest of the deceased, as well as on the knife sheath recovered by PW12, the head of the police forensic team for this case.

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[18] The learned trial judge then found s 300(c) satisfied, having regard to the nature and extent of the injuries, and the conduct of the appellant who not only came to the scene prepared with the knife, but also despite having stabbed himself first, attacked the deceased by stabbing her several times including in her chest and abdomen. PW20 testified that the stab wounds had severed the deceased's left lung, liver, stomach, pancreas, abdominal aorta, inferior vena cava and right kidney. Defensive slash wounds were also found in parts of her hands and elbows.

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[19] Crucially the High Court observed that PW20 gave evidence that the stab wounds, taken either individually or collectively, were sufficient in the ordinary course of nature to cause death. This therefore fulfilled limb (c) of s 300 of the Penal Code.

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[20] Having found that the prosecution had made out a prima facie case, the appellant was called upon to enter his defence. He elected to give evidence under oath.

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#### THE DEFENCE

[21] The principal defence of the appellant to the charge of murder levelled against him is that of a grave and sudden provocation under exception 1 of s 300 of the Penal Code. This was introduced at the prosecution stage and repeated in the defence stage where it was argued that the act of the appellant injuring himself first by stabbing and only after that the appellant started to stab the deceased showed that he did not have the intention to kill her.

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[22] The essence of the appellant's defence narrative is that due to problems in their relationship he had planned to kill himself in front of the deceased and for that purpose he brought a knife and a bottle of pesticide (poison) to confront the deceased. At the encounter, the deceased taunted him when he told her of his wish to commit suicide and continued to verbally abuse him after he had consumed the pesticide and stabbed himself four times at the abdomen.

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[23] The act of the deceased taunting and mocking the appellant constituted grave and sudden provocation that made the appellant lose his self-control which resulted in the appellant in turn attacking and stabbing the deceased as well. By then, after vomiting and his vision became blurry, he could not recall what had happened thereafter and lost consciousness until he was treated at UMMC.

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- A [24] The defence called one other witness, Dr Rusdi bin Abdul Rashid (DW2) from UMMC, who testified that the appellant was suffering from Acute Stress Disorder prior to the date of the incident. Essentially DW2 diagnosed that the appellant was suffering from acute stress disorder after the deceased ended their relationship. As a result, he was in a mentally fragile state and it made the deceased's callous remarks harder to bear. DW2 gave evidence that a person suffering from acute stress disorder such as the appellant would be more sensitive towards insulting, humiliating and provocative words. Whilst he could be a sane person, he could easily lose control when insulting or humiliating words are used.
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#### KEY FINDINGS AT THE CLOSE OF THE DEFENCE CASE

- D [25] At the conclusion of the defence case, the learned trial judge affirmed the position under the law that pursuant to s 105 of the Evidence Act 1950, and based on case law authorities, the burden of proving that a case, such as presently, which falls under the exception of grave and sudden provocation (in respect of s 300 of the Penal Code) is on the appellant, on a balance of probabilities.
- E [26] The learned trial judge found that in light primarily of the evidence of the events and conduct of the appellant leading to him meeting the deceased at the car park of the mosque, as well as his own testimony of what had occurred during the confrontation with the deceased which resulted in her death (and injuries to the appellant himself) the appellant could not be said to have lost his self-control by the alleged taunts made by the deceased. The High Court also determined that the appellant's state of mind at the material time was not one under severe depression.
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- G [27] The High Court as such held that the appellant had failed to establish the defence of grave and sudden provocation on a balance of probabilities and that instead, the prosecution had succeeded in proving its case against the appellant, as charged, beyond reasonable doubt.

#### H THIS APPEAL

- I [28] Although the appellant listed many grounds of appeal in the petition of appeal, for all intents and purposes, in substance, most of these may be grouped together since essentially the appellant submitted that the learned trial judge was wrong in finding a prima facie case, and in holding the defence of grave and sudden provocation was not made out. Following from this, several primary grounds of appeal were set out in the submissions of the appellant, as follows.

[29] The appellant argued that the High Court was in error in the determination that the appellant had the intention to murder the deceased by only referring in isolation to the injuries inflicted on the deceased and the preparation made by the appellant, but failed to appreciate the appellant's evidence that he had no intention to commit murder but only to commit suicide at the time of the incident.

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[30] The appellant also challenged what was argued to be the failure of the High Court to appreciate the testimony of DW2, a psychiatrist in UMMC on the mental condition of the appellant, especially DW2's testimony that the appellant was suffering from acute stress disorder prior to the date of the incident. The High Court also erred in fact and in law in finding that there was no evidence that the appellant was suffering from acute stress disorder at the date of the incident.

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[31] The other main, overriding ground of appeal is that the High Court had failed to appreciate that the defence of grave and sudden provocation had been established in this case that justified conviction on the lower charge of manslaughter instead.

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#### ANALYSIS AND FINDINGS OF THIS COURT

##### *The elements of murder fulfilled*

[32] We should state at the outset that we agreed with the findings of the High Court, which are not disputed by the appellant, that the prosecution had proved that the appellant committed the act which caused the death of the deceased. Having regard to the evidence of PW20 on the nature of injuries found on the deceased, the learned trial judge was correct to hold that the said act was done with the intention of causing bodily injury which injuries were sufficient in the ordinary course of nature to cause death. Expert medical evidence was available in this case for the High Court to affirmatively arrive at this finding on s 300(c) of the Penal Code, in line with the decisions of the Federal Court in cases such as *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174, *Cheong Kam Kuen v Public Prosecutor* [2013] 1 MLJ 15, and more recently *Pubalan all Peremal v Public Prosecutor* [2020] 5 MLJ 442.

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[33] In addition, we were also cognisant of an even more recent pronouncement by the Federal Court in *Zulkiple bin Mohamad v Public Prosecutor* [2022] 1 MLJ 479; [2022] 1 CLJ 673 which provides a useful and succinct analysis on the application of s 300(c). First, it is unnecessary in all cases that the evidence of the pathologist must affirmatively say that the injury in question is sufficient in the ordinary course of nature to cause death (as per the words in s 300(c)). Abdul Rahman Sebli FCJ, on the facts of that case,

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A stated as follows:

B [15] Whether the injury is sufficient in the ordinary course of nature to cause death is essentially a question of fact for the court to determine. Since however this is a matter that is in the realm of medical science, medical evidence is needed to assist the court in arriving at a decision. Obviously, it is not for any layperson without the proper medical training and background to determine as a matter of scientific fact whether a particular injury is sufficient in the ordinary course of nature to cause death.

...

C [20] The crucial part of SP13's evidence was that the injuries on the deceased's head could cause direct or almost immediate fatality, ie, death ('Kecelakaan-kecederaan tersebut boleh secara terus atau sehampir secepat menyebabkan kematian'). He testified that the deceased would not be able to survive the injuries.

D [21] This effectively means that the injuries were of a kind that is 'sufficient in the ordinary course of nature to cause death' within the meaning of cl (c) of s 300 of the Penal Code although SP13 did not describe the injuries in those exact terms either in his post mortem examination report or in his oral evidence in court. At the trial, SP13 was shown the baseball bat (P10A) that the police seized from the scene of crime and he confirmed that it could cause injuries 1, 2 and 3 found on the deceased's head.

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[34] Secondly, is the explanation on mens rea under the said provision, in the following terms:

F [53] The 'intention' or the *mens rea* element of murder under cl (c) of s 300 of the Penal Code must not be coalesced with the 'intention' or the mens rea element of murder under cl (a). Under cl (a), death is the intended consequence and death results as intended, whereas under cl (c), death is not the intended consequence but death results, not because death is intended but because the bodily injury intended to be inflicted is of a kind that is sufficient in the ordinary course of nature to cause death.

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H [55] It would thus appear that the appellant has misconstrued cl (c) of s 300 of the Penal Code. To recapitulate, his defence was that although his act of hitting the deceased's head with the baseball bat was intentional, he had no intention to kill her. He said he did not even know that his act was likely to cause death. In other words, what the appellant was saying was that his act of hitting the deceased's head with the baseball bat did not amount to murder as there was no intention to kill nor any knowledge that it was likely to cause death, even though his violent act resulted in the death of the deceased.

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[56] On our part, we have no doubt that the appellant's act was murder under cl (c) of s 300 of the Penal Code, not because it was done with the intention of causing death, or with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death, or with the knowledge that it was likely to cause death, or because it was so imminently dangerous that it must in all probability

cause death, but because the injuries were intentionally inflicted and the injuries were sufficient in the ordinary course of nature to cause death. A

[35] What this plainly means is that the elements of the offence of murder had been proved. However, the issue in this case is that the appellant had raised the defence of grave and sudden provocation which if successful would result in a conviction in the lesser offence of manslaughter or culpable homicide not amounting to murder. In fact, the written submissions of the appellant are definitive in stating that the evidence as a whole is sufficient to establish a lesser charge of culpable homicide not amounting to murder punishable under s 304(a) of the Penal Code. B C

*The law on defence of provocation*

[36] The principal issue in this appeal essentially revolves around the question whether the appellant had succeeded in establishing the defence of grave and sudden provocation. The aforementioned ground of appeal concerning the evidence of DW2 from UMMC is thus also directly pertinent to this defence. D

[37] It is important that we set out the applicable statutory provision on this defence, which is found in s 300 of the Penal Code, and states as follows: E

Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident. F

The above exception is subject to the following provisos:

- (a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person; G
- (b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;
- (c) that the provocation is not given by anything done in the lawful exercise of the right of private defence. H

Explanation — Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

[38] Based on this statutory provision, it is now settled law that in order to bring a case within the exception it is imperative that the following facts be established. First, the accused must have committed the act whilst being deprived of the power of self-control. Secondly, he must have been so deprived because of the provocation. Thirdly, the provocation must have been grave and I

- A sudden. Fourthly, the provocation must not have been sought by the accused, or voluntarily provoked by him or her as an excuse for doing the act. And fifthly, the provocation must not have been given by anything done in obedience to the law or by a public servant in the lawful exercise of his powers as such, or by anything done in the lawful exercise of the right of private defence.
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- [39] Further elaboration on what considerations could amount to a grave and sudden provocation may be found in the Federal Court decision in *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281 where the Nik Hashim FCJ, for the court, held:
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- [14] The question whether the provocation was grave and sudden such as to make the accused to lose his self-control is a question of fact and not one of law (see Explanation to Exception 1 to s 300 of the PC; *Kuan Ted Fatt v. Public Prosecutor* [1985] 1 MLJ 211; [1985] 1 CLJ 150; [1985] CLJ Rep 174 (FC). Each case is to be considered according to its own facts. The court must decide on the particular circumstances of that case whether the provocation was grave and sudden enough to permit an indulgent view of the crime committed by the accused, (see *Ratanlal & Dhirajlal, The Indian Penal Code* (29th Ed) 2002 p 1194).
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- [15] The test of grave and sudden provocation was clearly stated in the Supreme Court case of *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] 1 CLJ 143; [1988] 1 CLJ Rep 162. Seah SCJ in delivering the judgment of the court said:
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- The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see *Nanavati v State of Maharashtra AIR* [1962] SC 605, 530).
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- In determining what amounts to grave and sudden provocation the court may take into account the habits, manners and feelings of the class or community to which the accused belongs, but not of the particular idiosyncrasies of the accused: *Madhavan v State of Kerala* [1966] AIR Ker 258 (260).
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- [16] It is also said that the defence of provocation is a dual one: the alleged provocative conduct must be such as: (i) actually causes in the accused; and (ii) might cause in a reasonable man, a sudden and temporary loss of self-control as the result of which he kills the deceased.
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- [17] Thus, in order to successfully set up provocation as a defence for the reduction of the offence of murder to one of culpable homicide not amounting to murder, it is not enough to show that the accused was provoked into losing his self-control; it must be shown that the provocation was grave and sudden and must have by its gravity and suddenness caused a reasonable man to lose his self-control and induced him to do the act which caused the death of the deceased. In determining that question the court may also consider, along with other factors, the nature of the retaliation by the accused, having regard to the nature of the provocation.
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(See *Ratanlal & Dhirajlal*, p 1192; *Vijayan v Public Prosecutor* [1975] 2 MLJ 8; [1975] 1 LNS 189).

[40] As such, whether there was a grave and sudden provocation which did cause an accused to lose self-control is a question of fact, and that it must also be shown — as an objective test — whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed (but any particular idiosyncrasies of the accused to be disregarded) would be so provoked as to lose his self-control. As succinctly stated by the Federal Court in *Ikau Anak Mail v Public Prosecutor* [1973] 2 MLJ 153:

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To succeed in a defence of grave and sudden provocation, it is necessary in law for the defence to satisfy the court that not only by the act of the deceased that the accused had been deprived of the power of self-control but such acts of provocation would also have deprived a reasonable man of the power of self-control.

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[41] And in the process, the nature of the retaliation by the accused, having regard to the nature of the provocation may also be considered by the court.

*Whether the appellant only intended to commit suicide*

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[42] As the explanation in s 300 of the Penal Code states, whether the provocation was sufficiently grave and sudden to prevent the offence from amounting to murder is a question of fact. It is therefore useful to set out the narrative of the defence in this case with greater comprehensiveness given that critical reliance must be placed on the facts of the case vis a vis the defence of grave and sudden provocation raised by the appellant.

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[43] As correctly set out by the learned counsel for the appellant in his written submissions, based on evidence, which we should add is largely derived from the testimony of the appellant himself, the appellant — a married man, and the deceased first met on 1 October 2018 and then became a couple in a relationship. The appellant, a construction worker with a monthly salary of RM3,000, had spent around RM6,000 on the deceased within a short period of two months, including making purchases of an ‘iPhone’ and a ‘Casio G-Shock’ watch for the deceased.

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[44] However, after the appellant’s inability to fulfil her wish for him to buy a new refrigerator for the deceased, she became angry and from 5 December 2018 until the date of the incident on 22 December 2018 — a period of three days short of three weeks — the deceased refused any form of contact or communication with the appellant.

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[45] During this period, the appellant claimed of feeling hopeless due to his love for her, and had difficulties sleeping and concentrating at work. Unable to withstand the disappointment and sadness, he then decided to commit suicide in front of the deceased as the appellant felt cheated by the deceased and thought that the deceased had merely used him for her financial benefit. At the

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A same time, he felt ashamed and guilty towards his wife and daughter in Indonesia, and wanted the deceased to feel guilty for cheating him and further, to gain her sympathy.

B [46] This was what drove the appellant to attempt to commit suicide. Learned counsel submitted that the Court of Appeal case of *Tompo bin Yara v Public Prosecutor* [2017] 2 MLJ 366 held that the appellant's testimony on the reasons for his attempted suicide is also insightful as to what operated in the appellant's mind at the material time. In that case the appellant testified that he was driven to suicide because of the deceased's affair which made him ashamed and affected his reputation.

D [47] Thus, on the date of the incident, after returning to his rented apartment, the appellant first went to KK Mart near Masjid Al-Husna from about 6pm to 7pm where he purchased a bottle of pesticide (poison). The appellant had also brought with him a kitchen knife as he said he was concerned that he would not be able to commit suicide by just drinking the poison. He then waited for the deceased at the parking area.

E [48] At about 10pm, whilst the deceased was walking her way back from work (in Sunway Pyramid) and passing by the parking area of the mosque, the appellant approached her with the bottle of poison and the knife in his hands.

F [49] The appellant then exclaimed and cried out to the deceased these words — 'Kau menipu aku!' The appellant told the deceased that he felt ashamed and guilty towards his wife and daughter, and that he was very sad and intended to commit suicide.

G [50] However, the deceased instead laughed and scolded the appellant with these words — 'kau gila, kalau nak mati, pergi matilah!'.

H [51] The appellant then drank all the poison from the bottle. Within 15 to 30 seconds, he felt pain, his vision darkened and he then, using the kitchen knife, stabbed himself at the abdomen four times. He started to vomit.

I [52] However the deceased did not run away or leave the place. Instead, according to the appellant, she laughed at the appellant and mocked, taunted, insulted and humiliated him by saying these words — 'kamu anjing saya, laki-laki macam perempuan, kalau nak mati, pergilah!'.

[53] This was the provocation alleged by the appellant that resulted in him losing his self-control where he then removed the knife from his abdomen and started attacking and stabbing the deceased who was standing in front of him instead.

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[54] The principal contention of the appellant is that the appellant did not murder the deceased because his intention was only to commit suicide. Learned counsel for the appellant submitted that if the appellant truly had the intention to murder the deceased, he would not do so at a public area such as the car park of the mosque and that the appellant would have stabbed the deceased first to ensure that she was dead before he committed suicide. In other words, he only attacked the deceased after he lost self-control due to the provocation by the deceased. The appellant thereafter lay semi-conscious next to the deceased, only to regain consciousness at UMMC.

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[55] On this, we are of the view that even though the appellant is not inaccurate to contend that the car park was a public area this does not mean that members of the public were accessing the area at that time of the day given that the incident happened around 10.15pm to 10.45pm which was about two hours after the congregation at the mosque would have performed the final compulsory prayer of the day (*Isya*). It also does not mean that if the intention was to murder, he must have stabbed and killed her first before attempting suicide. There is no good reason why he could not have attempted to kill himself first before immediately stabbing to murder the deceased.

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[56] It is imperative to emphasise that the learned trial judge found that the appellant had first attacked and stabbed the deceased before injuring himself and finally making one final stab into the chest of the deceased. This is how it was described in the grounds of judgment:

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[31] ... Seterusnya mahkamah ini dapati dari keterangan dan keadaan kecederaan pada simati boleh disimpulkan bahawa tertuduh telah menikam si mati beberapa kali di bahagian dada dan perut dan akhirnya telah mencederakan dirinya sendiri sebelum menikam kali terakhir di bahagian dada si mati dan membiarkan pisau terpacak di bahagian dada si mati itu.

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[57] Learned counsel argued in the appellant's written submissions that the evidence of the appellant as a whole that the act of the appellant in buying the poison and bringing a knife and waiting for the deceased at the place of the incident is 'equally consistent' with his testimony that his intention was only to commit suicide in front of the deceased and not to commit murder. This, to us, clearly suggests that the appellant accepts that his version is not inconsistent with the presence of an intention to murder the deceased.

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- A [58] This is why we readily observed that the appellant thus contended that given the facts and circumstances, there can be more than one inference to be drawn against the appellant. And that it is well-established that a scenario which favours the accused should be preferred in cases where more than one inference may be drawn from the same set of facts. Here, learned counsel stated
- B that there are two inferences. The first, is the appellant's version that he had initially stabbed himself before he stabbed the deceased. The second, which is essentially the narrative of the case of the prosecution and the finding of the High Court is that the appellant had stabbed the deceased several times before stabbing himself and finally stabbing the deceased again. Learned counsel
- C submitted that the High Court had clearly failed to draw an inference favourable to the appellant that he first stabbed himself before he lost self-control as a result of being provoked and then only he stabbed the deceased.
- D [59] We do not think this line of argument is entirely correct, and one major flaw is that as mentioned earlier, it is for the appellant, as the accused who raised the defence of provocation to establish this defence on a balance of probabilities. It is thus not simply a question of which of two or more possible inferences ought to prevail or whether the one more or most favourable to the
- E accused should be accepted. This is because the larger and more important question is for the court to make a finding as to whether, considering all the evidence in this case, the defence of grave and sudden provocation has been made out by the appellant on a balance of probabilities.
- F [60] We further reiterate that after all, under s 105 of the Evidence Act 1950, the burden of proving the existence of circumstances bringing the case within any special exception such as Exception 1 to s 300 of the Penal Code is upon the appellant. It is also stated in s 105 that the court shall presume the absence of these circumstances. It reads:
- G 105 Burden of proving that case of accused comes within exceptions
- H Burden of proving that case of accused comes within exceptions. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.
- I [61] As such, for the defence of provocation to succeed, there must be evidence to support it, and the burden of proving the circumstances in s 105 is on the appellant, as the accused, on the balance of probabilities (see also the decision of the Federal Court in *Lee Chin Hock v Public Prosecutor* [1972] 2 MLJ 30). We therefore agreed with the decision of the learned High Court judge who had found that the killing of the deceased was deliberate and

intentional given the failure of the appellant to establish his defence of grave and sudden provocation, as will be discussed further below.

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*Whether evidence of acute stress disorder by DW2 should be accepted*

[62] Related to the above is the ground of appeal concerning the learned trial judge's non-acceptance of the testimony of DW2 pertaining to the mental condition of the appellant in that the appellant was suffering from acute stress disorder prior to the date of the incident. This issue is critically relevant to the question as to whether the appellant did lose his self-control at the material time. These were the reasons as stated in the grounds of judgment:

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[57] Mahkamah ini memutuskan bahawa keterangan SD2 tidak boleh dijadikan asas bagi menunjukkan tertuduh tidak mempunyai niat atau merancang untuk membunuh simati atau perbuatan tertuduh terhadap simati disebabkan hilang pertimbangan atau hilang kawalan tertuduh akibat provokasi yang besar dan mengejut oleh si mati.

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[58] Mahkamah ini tidak dapat menerima keterangan SD2 mengenai keadaan mental tertuduh itu yang mudah hilang kawalan akibat gejala *major depression* atau *acute stress disorder* memandangkan:

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- (a) SD2 bukan merupakan pakar psikiatrik. Walaupun semasa pemeriksaan utama SD2 menyatakan beliau seorang consultant bertugas secara klinikal di PPUM di Jabatan Perubatan Psikologi, namun semasa diperiksa balas oleh pihak pendakwaan SD2 menyatakan bahawa bidang beliau sebagai dalam *psychological medicine* iaitu berkaitan dengan hal ehwal ubatan berkaitan masalah psikologi bukan ahli psikologi sebenar;

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- (b) dapatan yang dibuat oleh SD2 mengenai mental tertuduh tidak konklusif bagi mahkamah ini menimbangkan apakah tertuduh menyedari perbuatan atau tertuduh mudah hilang pertimbangan waras apabila diprovokasi. Dapatan SD2 hanya berdasarkan temubual dengan pesakit (tertuduh) *diagnose* yang diberi adalah 'acute stress disorder'. SD2 juga menyatakan tidak banyak maklumat yang diperolehi daripada tertuduh selepas beliau menjalankan pembedahan. Oleh itu diagnosa yang dibuat terhadap tertuduh dibuat berdasarkan temubual yang dibuat dengan tertuduh dan berdasarkan observasi SD2 atas kecederaan tertuduh yang dilakukannya sendiri. Dapatan-dapatan lain yang dinyatakan oleh SD2 di Mahkamah ini hanya berdasarkan keadaan tertuduh yang dicadangkan oleh peguambela. SD2 juga memberi keterangan tidak berdasarkan laporan yang disediakan oleh beliau. Manakala semasa diperiksa balas SD2 bersetuju bahawa tiada laporan disediakan oleh beliau. SD2 datang ke mahkamah berdasarkan maklumat tertuduh melalui *electronic data system* (EMR) yang tidak menjadi sebahagian daripada barang kes mahkamah. Oleh itu mahkamah ini sukar untuk menerima keterangan SD2 berhubung keadaan mental tertuduh pada masa sebelum dan semasa kejadian; dan

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- A (c) dapatan SD2 hanya menyatakan bahawa tertuduh semasa dibenarkan keluar hospital diagnosis sebagai 'Acute Stress Disorder' bukannya major depression;
- Menurut SD2, *Acute Stress Disorder* masih memahami apa yang dilakukan. Semasa diperiksa balas SD2 menyatakan:
- B S: Doktor setuju ke *Acute Stress Disorder* ini, pesakit dia masih boleh memahami apa yang dia lakukan lah berbanding dengan orang gila. Setuju?
- J: Ya.
- C [59] Sekiranya keterangan SD2 ini boleh diambil kira, diagnosis yang diberi terhadap tertuduh Acute Stress Disorder itu hanya merupakan kemurungan tetapi tertuduh masih waras dan boleh memahami situasi yang berlaku.
- D [63] Thus, the High Court had first determined that DW2 was not an expert or true psychiatrist but his field was in the area of psychological medicine. The appellant argued this was erroneous and that DW2 was a qualified psychiatrist where he had obtained his degree in MBBS and thereafter Masters in Psychological Medicine. He was a specialist in the field of psychiatry at UMMC since 2006 and held the position as the 'Ketua Unit Rawatan di bawah psikiatri'.
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- F [64] The appellant also referred to the case *Wong Poh Ling v Public Prosecutor* [2017] MLJU 30; [2017] 1 LNS 16 where the expert witness of the defence in that case possessed similar qualifications to those of DW2 in the instant case and the latter was also the head of the department in UMMC. On top of that the prosecution in this case did not produce any expert evidence to rebut the evidence of DW2.
- G [65] We observed however that the learned trial judge was not wrong in his conclusion given DW2's own answers on the very subject when questioned in his cross-examination, as follows:
- H S: Dr, kalau dengan izin YA, kalau lihat pada CV kamu ini, bidang kamu adalah psychological medicine?
- J: Ya.
- S: Betul?
- J: Ya.
- I S: Berkaitan dengan hal ehwal ubatlah? Ubat-ubatan berkaitan dengan masalah psychology?
- J: Ya.
- S: Jadi dia bukanlah berkaitan dengan pure psychology betul?
- J: Ya betul, saya kena jadi doktor dulu, baru boleh jadi.

S: So bukan pure psychology lah?

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J: Ya bukan.

S: Jadi doktor ini lebih kepada hal ehwal ubat kan?

J: Yes.

B

[66] It is also of interest to note that in *Wong Poh Ling* the Court of Appeal affirmed the decision of the High Court which had actually preferred the evidence of the prosecution's expert witness to the defence witness (the doctor who had similar qualification with DW2's) mentioned by the appellant herein.

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[67] Even if the court was to accept that DW2 was an expert witness who testified as a psychiatrist, of greater importance is the following self-explanatory passage from the judgment written by Tengku Maimun JCA (now Chief Justice) in that same case of *Wong Poh Ling*:

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[52] It is an established principle of law that an expert's role is to explain to the judge the application of the necessary scientific or medical criteria so as to enable the judge to come to his own judgment by the application of these criteria to the facts proved in evidence. In other words, the experts are merely assisting the judge by giving their opinion. At the end of the day, it is the judge who must make his own determination on the matter opined by the experts (see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1980] 1 LNS 138) and it is entirely up to the learned trial judge to attach any weight to the opinion evidence of the experts (see *Chan Kwee Fong v Public Prosecutor* [2010] 1 MLJ 441; [2010] 3 CLJ 671).

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[68] The appellant however further asserted that the evidence of an expert witness can only be challenged and rebutted by the evidence of another expert. The High Court was therefore wrong in failing to take into account that the prosecution did not produce its own expert evidence to challenge and rebut the evidence of DW2. Learned counsel referred to another decision of this court in the case of *Public Prosecutor v Pham Ti Tuyet Mai (Vietnam)* [2019] 5 MLJ 404; [2019] 6 CLJ 325 which upheld the High Court's reasoning on the credibility of expert evidence, in particular on the following parts of the judgment written by Mohd Zawawi Salleh JCA (as he then was):

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[28] The learned trial judge has proffered his reasons as to why he accepted the expert evidence of SD2. His Lordship found that the evidence of SD2 was credible and inherently probable. The learned trial judge said at pp 28–29, AP Vol 1:

Credibility of SD2

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33. The prosecution had attempted to challenge the evidences given by SD2 and discredit her expertise. However, the prosecution did not make any application to provide other expert witness to counter this before examination of SD2. Neither did the prosecution call any expert evidence to rebut the evidence of SD2 at this trial.

A 34. In my considered view, this court is entitled to accept the opinion of SD2 and D133 on its face value unless the prosecution had called another expert evidence in rebuttal to contradict her.

B [69] We do not however think the above supports the stance of the appellant, in light of the abovementioned trite position as stated in *Wong Poh Ling*, and especially when the passage appearing immediately following the above para 34 in *Pham Ti Tuyet Mai* be considered, as follows:

C 35. Essentially, the expert opinion given in evidence at this trial is a matter of fact. In this aspect, the court could ask the relevant questions to SD2 for clarification to enable SD2 to provide cogent reason for her conclusion (see *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61; [1997] 2 CLJ 153). *This court is not bound by the expert opinion and could for its own opinion to form its findings.* (Emphasis added.)

D [70] Further, we are mindful that DW2 did give evidence that acute stress disorder is a psychiatric illness classified under anxiety disorder or excessive worry illness. And one of the symptoms of this illness is that the patient is exposed to a traumatic event. DW2 testified that the appellant had been exposed to two traumatic events. The first, it was claimed was when he was shut out by the deceased which led to the appellant feeling depressed, hopeless and often making mistakes at work as he kept on thinking about her and which also resulted in numb detachment as well as reduced awareness of surrounding, but increased arousal and easily frightened. The second event was when the incident resulted in her death happened.

G [71] DW2 also gave evidence that the symptoms of this disorder would persist for up to one month after the happening of a traumatic event and it would develop into major depression if left untreated. Thus, the appellant argued that this fit in with the duration between when the deceased blocked communication with the appellant and the date of the incident which was less than a month. A person experiencing acute stress disorder would be more sensitive towards insulting, humiliating and provocative words. Thus, even though the person may be sane, he could easily lose control when insulting or humiliating words are used against him.

I [72] DW2 also provided an explanation for the appellant's being unable to recall the incident clearly in that the appellant had also experienced dissociative amnesia which is another symptom of acute stress disorder. DW2 testified that the appellant was unable to recall what had happened not on purpose, given that at the time of the incident, he was deprived of his self-control, loss of consciousness and not aware about the events on the actual day. A person who suffered from dissociative amnesia is only deprived of self-control, loss of awareness at the time he was exposed to the traumatic event. Further, the

symptoms of being extremely anxious can lead to depression, thereafter post-traumatic self-disorder, and ultimately, suicidal behaviour.

A

[73] In the first place however, it bears emphasis that the High Court in the instant case also found that DW2 did not provide any report to support his opinion and findings on the appellant's mental condition. DW2 instead based his testimony on reading the information in the electronic data system (EMR) (IDD28) which however was not even tendered as evidence in court. We cannot therefore disagree with the submission of the respondent that other than those which DW2 himself observed during his examination such as the appellant's appearance of depression and his becoming dissociate (amnesia) when discussing the crime, the facts on which DW2 based his opinion were hearsay.

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[74] In the second place, at the same time, judicial acceptance of such opinion expressed by DW2 would run counter to the principle that where the opinion of experts is based on reports of facts, the facts must be proved independently unless they are within the experts' own knowledge. The former Federal Court, in the case of *Pacific Tin Consolidated v Hoon Wee Thim* [1967] 2 MLJ 35, in the judgment written by Ong Hock Thye FJ stated this:

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The trial judge did not accept such expert opinion and one of the main criticisms levelled against his judgment is that *he should not have ignored 'the evidence of highly qualified and independent experts who had made a study of the cause of the breach, but should have held, upon such evidence, that the breach was caused by the emergence of an artesian spring. It is argued that, when their evidence stood uncontradicted, it could not be ignored; that, in dealing with matters of science, the views of the judge himself, as a layman, should yield to those of the expert and that no alternative view differing from that of the experts could be tenable without cogent evidence in its support. This argument, however, ignores the fact that, in all cases in which opinion evidence is receivable, whether from experts or not, the grounds or reasoning upon which such opinion is based may properly be inquired into. Where the opinion of experts is based on reports of facts, those facts, unless within the experts' own knowledge must be proved independently: see Phipson on Evidence, (10th Ed) 1280. (Emphasis added.)*

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[75] In the third place, this is far from saying that we disregard the fact that there is no reason to presume the untruthfulness of the evidence of DW2 or the fact that there was no expert medical evidence to suggest the contrary to DW2's evidence. But we must highlight that it certainly cannot be denied, from the grounds of judgment of the learned trial judge in this appeal, that the learned trial judge had given his reasons as discussed above, as to why he could not accept the evidence of DW2 on the mental state of the appellant at the material time.

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A [76] The learned trial judge was at any rate in a better position than this  
court to assess the value of the evidence given by DW2 and other witnesses who  
testified at the trial. We should be slow to interfere with the learned trial judge's  
findings, more so, it goes without saying, when the court, like the learned trial  
B judge in this case, had actually made the requisite evaluation by scrutinising all  
the available evidence meticulously and not based on medical opinion solely.

[77] We should further add that in the instant appeal, the value of the expert  
evidence was sought by the appellant in reference to the issue of whether the  
C appellant had lost his self-control when attacking the deceased due to the  
alleged provocation. In cases such as *Wong Poh Ling* and *Pham Ti Tuyet Mai*  
however, in contrast, the expert medical evidence was especially essential since  
the court in these cases had to examine the defence of insanity to the charge of  
murder.

D [78] We further observed that the High Court concluded that based on  
DW2's evidence, the appellant was discharged from UMMC with acute stress  
disorder, not major depression and that a person suffering from the former  
would still be conscious and able to understand the situation. There was also no  
E evidence showing that the appellant was given any prescribed psychiatric  
medication. The High Court crucially determined that there was no evidence  
the appellant was suffering from acute stress disorder at the material time,  
being principally the date of the incident. This determination may be readily  
observed from the following passage in the grounds of judgment of the learned  
F trial judge:

[54] Mahkamah ini mendapati bahawa tidak ada bukti-bukti yang menunjukkan  
bahawa pada masa sebelum dan semasa perlakuan membunuh si mati itu, tertuduh  
mempunyai penyakit atau gejala 'Acute Stress Disorder' atau 'Major Dispression'.  
Keterangan pihak pendakwaan menunjukkan bahawa tertuduh sebelum pergi ke  
G tempat kejadian menunggu simati, tertuduh telah membeli cecair racun dan telah  
membawa bersama pisau. Perkara ini diakui sendiri oleh tertuduh. Tidak ada  
mana-mana keterangan semasa kes pihak pendakwaan atau daripada pihak  
tertuduh yang menunjukkan atau memberi gambaran bahawa tertuduh  
mempunyai gejala penyakit 'Acute Stress Disorder ...'

H [55] Mahkamah setelah menilai keterangan kes pihak pendakwaan dan pembelaan  
mendapati bahawa tiada ada perkara kemurungan yang amat sangat yang dialami  
oleh tertuduh sehingga tidak dapat mengawal diri secara sedar. Dari keterangan  
pihak pendakwaan menunjukkan tertuduh dalam keadaan sedar dan berupaya  
merancang secara rasional sebelum berjumpa si mati. Malah dari keterangan  
tertuduh sendiri beliau membeli racun untuk membunuh diri dan telah pulang ke  
I rumah untuk mendapatkan pisau dapur kerana bimbang sekiranya tidak mati  
dengan hanya minum racun sehingga beliau akan menikam diri sendiri. Pada ketika  
ini apabila diperiksa balas tertuduh menyatakan selama 23 hari kejadian simati  
tidak dapat dihubungi oleh tertuduh sehingga hari kejadian. tertuduh tidak  
mempunyai apa-apa perasaan marah terhadap si mati. tertuduh menyatakan,

*perasaan saya hanya biasa sahaja.* Dengan itu mahkamah dapati tertuduh tidak sedikit pun mengalami apa-apa kemurungan. tertuduh dalam keadaan sedar semasa melakukan serangan terhadap si mati semasa kejadian tersebut. A

[79] The High Court determined that there was no evidence that prior to and during the incident the appellant was actually suffering from acute stress disorder or any major depression. B

[80] We are of the view that the High Court was not wrong in making this finding. Evidence after all shows that the appellant was able to plan the purchase of the pesticide poison, brought along a knife and went to a quiet place (probably generally deserted by 10pm) to meet with the deceased. The appellant gave evidence that he had just finished working for the day and had returned home at Bandar Sunway had some rest before leaving the house. It was clearly a deliberate and 'well thought out' plan, thus clearly weakening the defence of the appellant suffering from some form of stress disorder or depression before the attack on the deceased. C D

[81] These facts according to the learned trial judge showed that the appellant was fully conscious and deliberate in his conduct and actions. Nothing in fact suggested that he was in a state of severe stress or depression that would affect his self-control. It must not be overlooked that the appellant was able to continue working after the deceased blocked communication between them. He was also able to relate what had happened prior to the stabbing incident in great detail. He remembered that the deceased would be off from work at 10pm, and that she would pass the parking lot in order to go back to her rented house. He even remembered taking the knife from the house and later stabbing the deceased. There is no rational basis to contend that the appellant did not know what he was doing. It bears emphasis that DW2 himself agreed in his testimony that even though there was acute stress disorder, the appellant was sane and could understand the situations which were developing ('... tertuduh masih waras dan boleh memahami situasi yang berlaku'). E F G

[82] We were not unaware of the evidence given by Dr Teoh Aik Poey (PW17) who treated the appellant at UMMC on the day of the incident on 22 December 2018. PW17 gave in exh P8 the diagnosis of 'multiple stab wound and major depression'. However the High Court held that PW17 is also not a psychiatrist. We are in any event also in agreement with the finding of the High Court that the diagnosis by PW17 was based on PW17's examination of the appellant at UMMC, which plainly did not cover the period immediately prior to and during the incident. Furthermore it was not out of place to take into account the possibility that any alleged depression experienced by the appellant whilst at UMMC could have resulted from his self-inflicted injuries. H I

A [83] In light of the above reasons, the learned trial judge was not in error in his decision not to accept the evidence of DW2 on the mental state of the appellant at the material time.

B *Whether there was grave and sudden provocation*

C [84] Considering the elements of the defence of grave and sudden provocation, and given the correct finding of the High Court which rejected the appellant's defence that he was adversely affected by acute stress disorder and major depression at the time of the incident which made him lose self-control when allegedly provoked by the deceased, it is strictly unnecessary to ascertain whether there was grave and sudden provocation since the appellant has already failed the said defence given there was no loss of self-control on the part of the appellant, as discussed earlier.

D [85] The learned trial judge had in any event applied the law to the facts and examined whether a reasonable man was likely to lose self-control as a result of the alleged grave provocation made by the deceased and whether the provocation was also sudden in that it was unexpected and that the interval between the provocation and the homicide was brief.

E [86] The High Court had correctly found there was no grave and sudden provocation. We wish to only add that further reference may be usefully made to *Tompo bin Yara*, the case cited by the appellant in his submissions, only for us to show why the contention of learned counsel could not pass muster.

F [87] Not unlike the present case, the murder accused in *Tompo bin Yara* had also attempted to commit suicide. In that case, the High Court convicted the accused for murdering his wife and for attempting to commit suicide after the murder. The offences were committed in a room the appellant and his wife shared in a house provided for workers in an oil palm plantation in Miri, Sarawak. The appellant had stabbed his wife multiple times and had also stabbed himself in the abdomen as well as slit his throat necessitating emergency surgery. His defence was one of grave and sudden provocation made by the deceased.

G [88] In both his cautioned statement and at trial, the accused maintained that he was asleep alone in his room when the deceased woke him up and then told him she was no longer in love with him and that she was involved with another man who worked in a nearby plantation. The accused testified he requested the deceased not to leave him as they had a ten year old son and her action would bring shame to their family. The accused gave evidence that when the deceased did not heed his advice but instead went on to say the other man was much younger, and was better in sexual performance than him and that he

should not ‘disturb’ that other man, the accused had become so enraged he took a knife he usually kept under his pillow and began attacking her with it. The accused said he could not recollect what happened after he started attacking the deceased but after he found that she was dead he stabbed himself in the abdomen twice and then slit his throat.

[89] The High Court in that case rejected the defence of provocation for the reasons among others of his findings that the accused was increasingly suspicious, jealous and angry because the deceased had been receiving many calls on her mobile phone from a stranger and had frequently been out to watch movies till late. The trial judge determined that the accused was fully aware of what he was doing at the material time because he had the time to ‘make sure’ his wife was dead before deciding to commit suicide.

[90] The Court of Appeal allowed the appeal, and convicted the accused on a lesser charge of culpable homicide not amounting to murder, sentencing him to 18 years imprisonment. We think it is apposite that the following passages from the judgment written by Mary Lim JCA (as she then was) be reproduced:

[50] We find that the conversation was first of all, uninitiated by the appellant. It was initiated by the deceased. To be awoken from one’s sleep to be told the words uttered by the deceased, that she did not like the appellant anymore, that she was having an affair with a man named Suprel, was at the very least, surprising, of concern and distressful. The appellant’s reaction is in keeping with his temperament (the appellant was ‘described as a good person and very normal’ — see para 46), as well as that of a reasonable man, which is to find out more details, to verify if there is any truth in what was being told. The appellant proceeded to do that. It was after the appellant was given details, that there was basis for concern and worry that the appellant proceeded to reason with the deceased. Again, this course of conduct as testified by the appellant is quite normal and reasonable but more significant, is the effect this line of conversation had on the appellant. He was learning for the first time of his wife’s affair with an individual called Suprel (and that is after being awoken from his sleep), and that his wife knew much of Suprel. Despite his persuasion and reasoning, his wife was refusing to desist continuing with the affair. Instead of heeding and sharing his concern for their young son and the embarrassment that would befall if the affair was made public especially with the presence of so many of his wife’s siblings in the plantation not to forget others back in Indonesia, she proceeded to insult and mock him by comparing their sexual performances. It would seem rather obvious that Suprel came out winning and this must have had quite an impact on the appellant for it was his late wife’s next words, not to disturb Suprel, that incensed the appellant so much that he, temporarily and completely, lost his self-control.

[51] ... As submitted by learned counsel for the appellant, the appellant was being ‘bombarded with shocking information which was incrementally making him lose his self-control’; that with the last mocking and telling off to the appellant that he was ‘not to disturb Suprel’ thereby putting Suprel before the appellant, her husband; it was indeed the last straw that broke the appellant’s self-control, that finally pushed

- A the appellant over the precipice and lose his self-control. In his frenzied fit of anger, incensed and singularly provoked by the deceased, the appellant grabbed the knife from under his pillow and proceeded to stab his wife. The manner in which he stabbed her, not knowing where, how many times and her reaction, whether she fought back or cried out, all indicate that level of uncontrollable anger, rage and loss of self-control. We agree with the submission of learned counsel for the appellant
- B that to be woken in the dark, told of such shocking news of the affair and the seriousness of the affair with indications of how long it probably might have been carrying on coupled with the embarrassment of his family breaking up was simply too much for the appellant to bear especially in a Bugis Indonesian community, whether at the plantation or at home back in Indonesia.
- C [52] We are of the considered view that the appellant was provoked into attacking his wife by his wife's own utterances to him, that the utterances are provocative, angering and humiliating when conveyed to a recipient who is her husband, the appellant. We agree with learned counsel for the appellant that any reasonable man of the appellant's race, religion, class and background would also have been provoked in similar circumstances of the case. The attempt at suicide is also but another facet or manifestation of that loss of self-control, all provoked by the deceased who instigated and provoked the whole unfortunate episode. We have no doubt that the deceased's provocative words, spoken in the manner and circumstances as described by the appellant whose credibility was not really tested or challenged by the prosecution, were indeed sufficiently grave and sudden to prevent the appellant's action and reaction of killing of the deceased from amounting to murder. As seen from the tone and cumulative progression of conversation, the appellant suddenly snapped and spontaneously reacted with no time for cooling off, contemplation or pondering of his next course of action or response when the deceased uttered the critical words of telling off the appellant not to disturb Suprel. The appellant was quite clearly taunted and mocked by the deceased such that he reacted in the unfortunate manner that he did. We can appreciate the proportionality of his action to the taunts by the deceased, that as a result of his loss of self-control, the appellant used excessive force.
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- G [53] We are consequently satisfied that on the evidence of the prosecution's witnesses and the cautioned statement of the appellant, the defence of grave and sudden provocation which entitled the appellant to a reduced charge under s 304(a) of the Penal Code has been established on a balance of probabilities. The dual conditions as stipulated in *Che Omar Mohd Akhir v Public Prosecutor* are met. We find that contrary to the findings of the learned judge, the evidence show that the deceased's provocative words uttered in the conversation in the early hours of 16 January 2014 actually caused in the appellant as it might cause in a reasonable man, a sudden and temporary loss of self-control, the result of which the appellant killed the deceased. We are satisfied with the appellant's claim that he was not aware or suspicious of the affair with Suprel since any prior knowledge that he may have had of any extramarital affair was already resolved in December 2013. This appears in the testimony of the appellant as well as that of PW5.
- H
- I

[91] We reiterate that like in *Tompo bin Yara*, the evidence on the version as to what had taken place in this instant appeal was almost entirely based on the

testimony of the appellant himself, which we did not deny had been fairly consistent even with his cautioned statement. But that in truth is the only similarity between these two cases.

A

[92] Now, even though the defence of provocation was established in *Tompo bin Yara*, that case provides little or no support for the appellant herein on account of several considerations. First, as stated above, the conversation which led to the provocation in that case was initiated by the deceased. In fact the whole incident was triggered by the deceased who had woken the accused from sleep to break him the shocking news about the existence of another man, the third person in their marriage. Contrast that with the situation in the present appeal, where it was the appellant who first spoke by exclaiming to the deceased 'Kau menipu aku!' and how he felt guilty and that he wanted to kill himself, and to begin with, it was the appellant who had planned to do so by waiting for her at the car park area of the mosque.

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[93] The deceased in the instant appeal did not even know there was supposed to be any confrontation with the appellant. She was merely walking back home after work. It seems not out of context in the instant appeal to suggest that the appellant could not show that the provocation was not sought or voluntarily provoked by the offender as an excuse for the killing, as per proviso (a) to Explanation 1 of s 300.

E

[94] Secondly, the utterances made by the deceased wife in that case are quite demonstrably provocative. She was basically telling her husband that she did not love him anymore and was instead having an affair with another man. Worse, despite him trying to reason with her not to leave him and to think about their young child, considering the ramifications of untold embarrassment he would suffer in their closed knit community at the plantation, she began comparing his sexual performance with that of her lover, expressing preference for the latter's instead of her husband's. This culminated in the accused losing self-control when the deceased told him not to disturb her lover.

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[95] Again, in sharp contrast, the utterances by the deceased in the instant appeal concerned the subject of suicide raised by the appellant himself as the deceased allegedly responded to the appellant's wish to commit suicide by egging him on and daring him to do so, telling him that he was a weak man. The utterances by the deceased in those circumstances, assuming it existed and if examined subjectively or objectively (see further below), did not in our view constitute grave and sudden provocation, as correctly found by the learned trial judge.

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[96] Thirdly, in *Tompo bin Yara*, it was also found, as stated above, that the

A accused's attempt at suicide was a manifestation of his loss of self-control, provoked by the deceased who instigated the entire episode. In the instant appeal, the appellant's attempted suicide was primarily claimed to have been his deliberate plan all along, thus in that sense not wholly (if at all) the consequence of any loss of self-control.

B  
C [97] Fourthly, it was also held in *Tompo bin Yara* that any reasonable man of the accused's race, religion, class and background would also have been provoked in similar circumstances of the case. This, as stated earlier, was a necessary finding for the defence to succeed because the provocation must be sufficient to deprive a reasonable man of his self-control.

D [98] In other words the question to be asked is whether a reasonable man is likely to lose self-control as a result of the said provocation, and the test to be applied is that of the ordinary man of the community the appellant is part of. This must mean that the peculiarities of the appellant should be disregarded in considering this test. Thus for this objective test, whilst the court can take into considerations matters such as the habits, manners and feelings of the class or community to which the appellant belonged, the peculiarities, experiences or problems encountered by the appellant personally such as depression, sadness, stress and heightened emotional state, which reactions would not be unusual after a breakup are not relevant.

E  
F [99] We emphasise that peculiarities and idiosyncrasies of an accused such as the appellant should be taken into account in the first, subjective limb of the analysis to ascertain whether he was indeed provoked by the grave and sudden provocation that resulted in the loss of self-control that made him kill the deceased. These might include what learned counsel submitted to be his mental state having been adversely affected by a major depression or an acute stress disorder at the material time. We have dismissed this submission for lack of evidence and agreed with the findings of the High Court.

G  
H [100] But even if this illness were proven to exist (and had in turn caused the loss of self-control), this is entirely irrelevant in the second, objective test limb as to whether a reasonable man (the ordinary man from his community) would have reacted the same way as the appellant had done, and that in any event, there is similarly a patent paucity of evidence to show such a reaction by a reasonable man.

I [101] We are also in agreement with the finding of the High Court that even if there was a provocation by the deceased in her utterances of the taunts, the appellant's reaction in his retaliation was disproportionate to the provocation. Additionally, a reasonable man in the situation and circumstances of the

appellant would not have acted as the appellant did, attacking and killing a defenceless woman with multiple stabbings.

A

[102] The appellant testified that after the deceased uttered 'kamu gila kalau hendak mati pergi matilah', he consumed the poison and a minute later his vision became blurry and dark. He started to vomit and he felt like falling down. This was when he stabbed himself but the deceased continued taunting him, saying 'kau anjing saya, laki-laki macam perempuan, kamu nak mati pergilah'.

B

[103] The appellant said that it was at this point that he had lost control when he pulled out the knife which had been stabbed into his stomach and started to attack the deceased by stabbing the deceased with the same knife as his vision got even worse. He could not recall what happened thereafter.

C

[104] On the basis of the totality of the evidence in this case, we however find no good reasons to depart from the finding of the High Court that the defence version was not reasonable to be believed in that based on his own evidence, despite the appellant having drunk all the poison, and stabbed himself in the abdomen with the knife four times and then vomited, the deceased, who was witnessing all these did not run but instead laughed and continued to mock and taunt him, uttering 'kamu anjing saya, laki-laki macam perempuan, kalau nak mati, pergilah!'.

D

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[105] Even more dubious and incredulous was the assertion that as a consequence of the taunting (assuming it did happen) by the deceased, the appellant lost self-control and he claimed to have removed the knife from his abdomen (from the alleged earlier self-stabbing) and viciously attacked the deceased, who based on his evidence, did not even try to run but remained standing in front of him and appeared to have allowed herself to be stabbed multiple times, leading to her death.

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[106] On top of that, based on his version, the appellant had seriously injured the deceased with multiple stabbings even when the appellant's own physical condition, according to himself, was weak as he felt like collapsing, and with blurred vision. Yet, at the same time the deceased had allowed herself to be viciously attacked (instead of running away) by a man who claimed to be at that point in time in such a weak and confused state and whose vision was somewhat impaired.

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[107] We accordingly find no valid basis for appellate intervention in the absence of any appealable error in the following conclusion arrived at by the learned trial judge on the failure of the appellant to establish the defence of grave and sudden provocation:

- A [61] Didapati diakhir jalur pembelaan ini, ia amat tidak munasabah sekali tertuduh boleh mencederakan si mati dengan menikam bertubi-tubi dalam keadaan tertuduh sendiri begitu lemah dan penglihatannya kabur. Tidak mungkin simati dengan sendiri sengaja menyerahkan tubuh badannya untuk dcederakan oleh tertuduh dalam keadaan tertuduh yang begitu lemah dan kabur penglihatan.
- B Naratif tertuduh mencabut pisau yang berada di perut tertuduh dan cuba menyerang simati dan tertuduh selepas itu tidak ingat apa yang terjadi adalah suatu yang tidak boleh diterima akal dan merupakan satu-satu yang diada-adakan memandangkan terlalu banyak kecederaan yang dialami oleh si mati. Hanya orang yang sedar sahaja yang boleh melakukan kecederaan atas si mati yang banyak sebegitu rupa. Apa yang lebih munasabah adalah sepertimana dapatan yang mahkamah buat sebelum itu iaitu tertuduh dalam keadaan sedar dan telah menyerang dan menikam simati bertubi-tubi sebelum tertuduh mencederakan dirinya dan akhirnya menikam sekali lagi si mati buat kali terakhir dan membiarkan pisau tersusuk di dada si mati.
- C
- D [62] Pembelaan bangkit marah yang besar dan mengejut yang diutarakan oleh tertuduh adalah berhubung dengan kata-kata yang dilafazkan oleh simati iaitu *kau anjing saya, lelaki macam perempuan, kamu nak mati pergilah* bukan satu kata-kata provokasi yang mengejut dan boleh membangkitkan kemarahan yang besar dalam hal keadaan kes tertuduh ini sehingga tertuduh hilang kawalan diri. Tertuduh dalam naratif pembelaannya menunjukkan bahawa beliau bersedia dengan apa-apa kemungkinan termasuk membunuh diri untuk berjumpa simati. Kata-kata si mati itu jika dilafazkan sekalipun seharusnya tidak membangkitkan perasaan marah yang besar pada tertuduh. Sebagai seorang biasa yang ditinggalkan kekasih dalam tempoh masa tertentu dan datang dari komuniti yang serupa dengan tertuduh yang merupakan seorang yang dewasa dan beristeri serta mempunyai anak tidak akan hilang kawalan diri dan bertindak seperti yang telah dilakukan oleh tertuduh, hanya dengan kata-kata sedemikian.
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- G [63] Mahkamah ini mendapati tidak terdapat satu bangkit marah yang besar dan mengejut yang boleh memudaratkan keupayaan tertuduh untuk berfikir dan memberi dorongan kepada perbuatan membunuh. Malahan serangan tertuduh atas simati tidak sepadan dengan kata-kata yang dilafazkan oleh si mati. tertuduh dengan ini telah gagal atas imbangan kebarangkalian untuk menimbulkan pembelaan bangkit marah yang besar dan mengejut oleh si mati. Sebaliknya pihak pendakwa telah membuktikan kesnya melampaui keraguan munasabah terhadap tertuduh.
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## CONCLUSION

- I [108] In conclusion, in light of the foregoing analysis and reasons, we found nothing erroneous in the findings of the learned trial judge and the manner as to how he had arrived at his conclusion, bearing in mind the evidence he had before him. The law, as earlier stated was more than clear. We found no merits in the appeal. The learned trial judge had considered all the evidence in coming to the conclusion that the prosecution had proved its case against the appellant beyond reasonable doubt.

[109] In our judgment, the appellant had therefore failed to establish the defence of grave and sudden provocation on the balance of probabilities and he had also failed to raise any reasonable doubt as to his guilt. There being no appealable error on the part of the learned trial judge as to warrant our appellate intervention, and as we found no reason to disturb the findings of the learned trial judge, on the totality of the evidence, we found the conviction safe.

[110] We therefore unanimously dismissed the appeal and we affirmed the conviction and sentence of the High Court.

*Appeal dismissed; conviction and sentence of High Court affirmed.*

Reported by Dzulqarnain Ab Fatar

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